

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION


PACIFIC FREIGHT EXPRESS,)	NO. 08 C 475
)	
)	
Plaintiff,)	
)	
v.)	
)	
MIDWEST AIR TECHNOLOGIES, INC.,)	
)	
Defendant.)	

MOTION FOR LEAVE TO FILE MOTION TO DISMISS

Defendant, MIDWEST AIR TECHNOLOGIES, INC., by its attorneys, RIEBANDT & DEWALD, P.C., for its Motion for Leave to File Motion to Dismiss, states:

1. Defendant was served on or about January 26, 2008.
2. Defendant delivered a copy of the Complaint to counsel on or about February 22, 2008.
3. Defendant filed its Appearance on February 26, 2008.
4. Defendant was unable to file its answer or responsive pleading until now. Defendant attaches its Motion to Dismiss and Memorandum in Support thereof hereto as Group Exhibit "1"; and, requests leave to file same instant.

WHEREFORE, Defendant, MIDWEST AIR TECHNOLOGIES, INC., requests this Honorable Court to allow it to file its Motion to Dismiss and Memorandum instant.



Lee F. DeWald, Attorney for Midwest
Air Technologies, Inc.

RIEBANDT & DEWALD, P.C.
1237 South Arlington Heights Road, P.O. Box 1880
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(847) 437-0303

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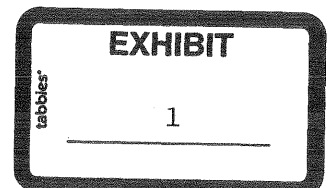
DEFENDANT'S MOTION TO DISMISS THE COMPLAINT

Defendant, MIDWEST AIR TECHNOLOGIES, INC., by its attorneys, RIEBANDT & DEWALD, P.C., by its attorney as hereby move to dismiss the Complaint in its entirety pursuant to Fed. R. Civ. P. 12(b)(6) because it is time-barred; and, the state Court already dismissed the claims presented.

Respectfully submitted,

Lee F. DeWald, Attorney for Midwest
Air Technologies, Inc.

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**MEMORANDUM IN SUPPORT OF
DEFENDANT'S MOTION TO DISMISS**

Plaintiff has sued Defendant for the alleged non-payment of interstate freight charges as identified on the Complaint exhibits. Defendant asks this Court to dismiss the entire Complaint because it is time barred.

STATEMENT OF CASE

Plaintiff alleges that it sold and delivered goods and services, including freight shipment and rental equipment as identified in the exhibits. Comp. ¶1 and Ex. "A". Exhibit "A" is a group exhibit wherein the first page is an "A/R Aging Quick Zoom" report with certain invoices circled and starred. Comp. Ex. A.

The other pages to the exhibit are invoices which correspond to the circled and starred invoices, invoices which are not the circled and starred invoices, and bills of lading. The invoices that are circled and starred total \$2,329.74; and, are all dated in the year 2005. Comp. ¶3 and Ex. A.¹

¹There appears to be a mathematical error in the Complaint; however, it may be due to clarity of the Complaint. Moreover, State Farm Mutual Automobile Insurance is not a named party in the caption; and, Defendant is unsure as to its connection to the Complaint.

ARGUMENT

All of the circled and starred invoices are for the movement of freight between two states.
Comp. Ex. A.

Pursuant to 49 U.S.C. §13501, the Secretary and the Board of the Surface Transportation Board, have jurisdiction over transportation by a motor carrier and the procurement of that transportation to the extent that property is transported by the motor carrier between a place in a state and a place in another state and another place in the same state through another state. When the Secretary and Board have jurisdiction there are certain limitations on actions by motor carriers. Specifically, Section 14705 provides that a carrier providing transportation or service must begin a civil action to recover charges for transportation or service provided by the carrier within eighteen (18) months after the claim accrues. It further defines the accrual date as the delivery or tender of delivery by the carrier. 49 U.S.C. §14705.

Additionally, there are no due dates on the invoices. Even if we assume that the terms are "net 30" all of the invoices are over due by more than eighteen (18) months from the due dates. Plaintiff filed suit in January, 2008, almost one (1) year after the most recent invoice of May 9, 2005 statute of limitations ran. Therefore, the Complaint should be dismissed with prejudice. Moreover, because Plaintiff has failed to plead any basis for tolling the statute of limitations, he has "effectively plead[ed] [him]self out of court." *Hollander v. Brown*, 457 F.3d 688, 691 n.1 (7th Cir. 2006); accord *United States v. Lewis*, 411 F.3d 838, 842 (7th Cir. 2005) (although typically plaintiffs need not anticipate affirmative defenses in their pleadings, dismissal under Rule 12(b)(6) is proper where a "complaint plainly reveals that an action is untimely under the governing statute of limitations").

Additionally, Plaintiff tried to recover on these invoices in a currently pending state court case entitled *Pacific Freight Express v. Midwest Air Technologies, Inc.*, Circuit Court of Cook County, Illinois, Case No. 07 M1 123717. In that case, pursuant to Motion, the Court dismissed all time barred interstate freight claims. See pleadings and Court's Order attached hereto as Exhibit 1.

CONCLUSION

Defendant respectfully requests the Court to dismiss Plaintiff's Complaint as time barred; and enter any further and/or additional relief as the Court deems appropriate.

Respectfully submitted,

Lee F. DeWald, Attorney for Midwest
Air Technologies, Inc.

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